Office - Supreme Court, U.S.
FILED
MAY 4 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-728

In the Supreme Court of the United States

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

CHRISTOPHER TOMPKINS
of
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: 504/581-5141
Attorneys for Amicus Curiae
Kerr-McGee Corporation

Of Counsel:
RENE' H. HIMEL, JR.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

BEST AVAILABLE COPY

13 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether it is proper for the Court of Appeals to extend the landward coverage of the Longshoremen's and Harbor Workers' Compensation Act to areas not specifically included in the Act or its amendments, in the absence of an expression of congressional intent to include such areas.

(2) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a classification of workers or to an occupation not specifically included in the Act or its amendments.

(3) Whether it is proper for the Court of Appeals to extend the coverage of the amended Longshoremen's and Harbor Workers' Compensation Act to a non-maritime worker doing repair work on a fixed platform not owned or operated by that worker's employer and located in state waters.

INTEREST OF KERR-McGEE CORPORATION

Kerr-McGee Corporation is the owner and operator of numerous stationary drilling and production platforms offshore Louisiana and Texas. These platforms are over the Continental Shelf or in Louisiana territorial waters. Kerr-McGee employs about 350 workers on these platforms, of which number roughly 50% are working on one or another of these platforms on any given day. In addition to its own employees, there may be something in the vicinity of 200 contract workers on these platforms daily.

Until now, Kerr-McGee has consistently compensated its employees or their dependents, in the event of disability or death occurring on a platform located in Louisiana's waters, in accordance with the compensation laws of that state. The decision of the Court of Appeals in the case at bar has confused a heretofore clear mandate and brings uncertainty into Kerr-McGee's offshore compensation program.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
INTEREST OF AMICUS CURIAE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CONSENT OF PARTIES	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	6
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases: **Page**

Boudreaux v. American Workover, Inc.,
664 F.2d 463 (5th Cir. 1981) 5

Director, Office of Workers' Compensation Programs, v. Perini North River Associates,
__ U.S. __, 103 S.Ct. 634 (1983) 4, 5, 6

Herb's Welding v. Gray,
703 F.2d 176 (5th Cir. 1983) 2, 3, 4, 5

Northeast Marine Terminal Co. v. Caputo,
432 U.S. 249, 97 S.Ct. 2348 (1977) 5

P. C. Pfeiffer Co. v. Ford,
444 U.S. 69, 100 S.Ct. 328 (1979) 5

Philbrook v. Glodgett,
421 U.S. 707, 95 S.Ct. 1893 (1975) 2

Pippen v. Shell Oil Company,
661 F.2d 378 (5th Cir. 1981) 5, 6

Rodrigue v. Aetna Casualty & Surety Co.,
395 U.S. 352, 89 S.Ct. 1835 (1969) 2, 5, 6

Weyerhaeuser Co. v. Gilmore,
528 F.2d 957 (9th Cir. 1975), *cert. den.*,
429 U.S. 868 (1976) 6

Statutes:

33 U.S.C. 903(a) 3

U.S. Code Congressional and Administrative News
1972, Vol. 3, p. 4708 4

NO. 83-728

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

HERB'S WELDING, INC. and
UNITED STATES FIDELITY & GUARANTY CO.

Petitioner

VERSUS

ROBERT H. GRAY

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

CONSENT OF PARTIES

This brief is filed with the written consent of all parties hereto, these consents being on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The extension by the United States Court of Appeals for the Fifth Circuit of the "situs" coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) to fixed offshore drilling platforms, classified by

this Court as artificial islands and not included expressly or inferentially in the structures to which Congress extended such coverage in 1972, and its extension of the Act's "status" coverage to non-maritime workers, not in the platform owner's employ and who do not load, unload, build or repair ships, is founded upon an incorrect legal premise and amounts to judicial legislation beyond the intent of the Congress.

ARGUMENT

Situs

This Court has said that in expounding a statute [a court] must not be guided by a single sentence or member of a sentence but [must] look to the provisions of the whole law, and to its object and policy.[1] So should it be in expounding an opinion of this Court for purposes of precedent.

Instead, the Court of Appeals picked up a word from the decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and bottomed its decision that the situs requirement is met here, on the proposition that in *Rodrigue* "Justice White...likened (platforms) to wharves located above navigable waters". *Herb's Welding v. Gray*, 703 F.2d 176, 177.

What Justice White's opinion in *Rodrigue* in fact did was to hold that fixed offshore drilling platforms are artificial islands, and that accidents thereon "would be no more under maritime jurisdiction than accidents on a wharf above navigable waters". 395 U.S. at 366.

[1] *See, Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 1898 (1975).

Nonetheless, the Fifth Circuit went on to say that fixed platforms are in effect wharves for LHWCA purposes because they "are essential to and customarily used in loading and unloading of crews, supplies and oil (and) their function is precisely that of wharves". 703 F.2d at 178.

It is quite a judicial leap to classify an entire artificial island, used to drill wells to produce oil and gas, as a wharf merely because crews, supplies and oil are incidentally loaded thereon and unloaded therefrom, especially since, in extending LHWCA coverage to "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used *by an employer* (emphasis added) in loading, unloading, repairing or building a vessel",[2] Congress made no mention of drilling platforms.[3]

The Court of Appeals stated that the "jurisprudential concept of an island carries with it the concept of the island's shore and the function of the structure as a wharf projects from that 'land' ". Nowhere does the Court say that Gray was injured on the island's shore, however, and it is clear that he was not engaged in loading or unloading a vessel, nor was his employer, even if artificial islands or portions thereof are sometimes used for such purposes.

Status

Gray was injured while working as a welder on a

[2] 33 U.S.C. §903(a).

[3] Many services on offshore platforms are rendered by non-maritime workers, like Gray, in the employ of non-maritime independent contractors, yet the Fifth Circuit nowhere addressed the fact that the platform probably was not used for loading and unloading by Gray's employer, Herb's Welding, but by the platform's owner (Chevron).

fixed platform located within the territorial waters of the State of Louisiana. His employer, Herb's Welding, was a company which provided welding services to oil field rigs. *Herb's Welding v. Gray*, 703 F.2d 176, 177. According to the findings of fact and conclusions of law entered by the Administrative Law Judge, the work activity of Gray and his employer was totally involved in exploration, development and transmission of oil and gas from under and on submerged lands. That judge found that there was nothing inherently maritime about these activities (App. "C", Petition for Writ of Certiorari herein, p. A-17). Gray was not engaged in loading, unloading, repairing or building a vessel.

A purpose of the Committee on Education and Labor, to which was referred the bill to amend the Longshoremen's and Harbor Workers' Compensation Act, was to permit a uniform compensation system to apply to employees who would otherwise be covered by the Act for part of their activity.[4] The Committee expressly reported that it did not intend to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity.[5]

In other words, the Committee said, in effect and for instance, that a longshoreman who is busy loading a ship and so covered by the LHWCA while driving his forklift across the deck of the vessel toward the dock, would now likewise be covered when he gets on the dock—so would a

[4] U.S. Code Congressional and Administrative News, 1972, Vol. 3, p. 4708.

[5] *Ibid;* See, *Director v. Perini North River Associates*, 103 S.Ct. 634, 648 (1983)

fellow-employee who does not necessarily get on the vessel[6]—but just because a longshoreman injured on the dock is now covered, coverage will not be extended to a non-longshoreman injured on the same dock.

Nevertheless, the Court of Appeals here resolved the "status" requirement in favor of coverage of this non-longshoreman (Gray) by holding that "his work was necessary for the offshore drilling process in that gas line maintenance is vital to the drilling and removal of gas and oil" and that "offshore drilling—the discovery, recovery and sale of oil and natural gas from the sea bottom—is maritime commerce". 703 F.2d at 180.

The only authority cited for this proposition is the same court's decision in *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981), which, unlike this case, involved a worker on a vessel (a drilling barge), and not one on a fixed platform or artificial island. While the Court may have reached the correct conclusion in *Pippen*, it was not for the right reason. Pippen, because he was injured while working on navigable waters, retained a traditional claim under LHWCA, since nothing in the 1972 amendments to the Act took away coverage which existed before the amendments.[7]

[6] See, *P. C. Pfriffer Co. v. Ford*, 444 U.S. 69, 81-83 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 274 (1977); "Since it is clear that (Caputo) would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate."

[7] See, *Director v. Perini North River Associates*, 103 S.Ct. 634, 651 and Judge Gee's comments on "Inland marine oil production as 'maritime commerce or navigation' " in his dissent opinion in *Boudreaux v. American Workover, Inc.*, 664 F.2d 463, 479 (5th Cir. 1981). See also, expert testimony cited in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 365 (1969).

In likening Pippen's situation to Gray's, the Court of Appeals has equated the situation of a person traditionally covered, who worked on a vessel in navigable waters and whose work "was essential to the function of the vessel" [*Pippen v. Shell Oil Co.*, 661 F.2d 378, 383 (5th Cir. 1981)] to that of a worker on a fixed platform or artificial island engaged in a non-maritime activity. Not only is the analogy in direct conflict with the legislative intent (as shown above), but it appears to be inconsistent with this Court's holding in *Rodrigue* that a drill pipe tester's fall from a derrick on a drilling platform "had no more connection with the ordinary stuff of admiralty than do accidents on piers".

It also appears to conflict with the holding of the United States Court of Appeals for the 9th Circuit—that the "status" issue depends upon whether the employee's activities have a "realistically significant relationship to traditional maritime activity." *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 961 (9th Cir. 1975), *cert. denied* 429 U.S. 868, since it can hardly be said that this welder's work had a realistic relationship to traditional maritime activity.

CONCLUSION

To paraphrase the Supreme Court in *Perini*, "the question of (Gray's) coverage is an issue of statutory construction and legislative intent".[8] Yet the Court of Appeals here attempts to force the congressionally expanded definition of "navigable waters" to now include offshore platforms, in spite of the legislative intent—well shown in *Rodrigue*, to treat such platforms as islands; and the Court of Appeals classifies an activity (welding) as "maritime employment", without any statutory justification for so

[8] 103 S.Ct. at 641.

doing and without any attempt to show a legislative intent to add such a classification to those occupations specifically enumerated in the definition of "employee".[9]

In reasoning as it has, the panel has overlooked the underlying proposition that the 1972 amendments concern themselves with landward extension of coverage to persons (or their ilk) whose basic work is on actual navigable water and has affirmed an award to a type of worker who for all that is shown, may never work on actual navigable waters and certainly is not a member of an occupation which is enumerated in the statute or the 1972 amendments or for which there is any basis for inferential inclusion.

Respectfully submitted,

CHRISTOPHER TOMPKINS
DEUTSCH, KERRIGAN & STILES
755 Magazine Street
New Orleans, Louisiana 70130
Telephone: 504/581-5141

Of Counsel:
RENE' H. HIMEL, JR.

[9] Cf. Justice Rehnquist's concurring opinion in *Perini*, and see Justice Stevens' dissenting opinion in that case, 103 S.Ct. 634, 652.

CERTIFICATE OF SERVICE

Undersigned counsel, a member of the Bar of this Court, certifies that three copies of this amicus curiae brief have been sent to each counsel of record by depositing same in the United States Mail, postage prepaid this ____ day of May, 1984.

Rex E. Lee, Esq.
Solicitor General
Department of Justice
Washington, D.C. 20530

James J. Brady, Esq.
P.O. Box 1792
Alexandria, La. 71301

T. Gerald Henderson, Esq.
P.O. Box 407
Alexandria, La. 71301

Wood Brown, III, Esq.
Montgomery, Barnett, Brown & Read
1800 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112-1799

Undersigned counsel further certifies that all parties required to be served have been served.

Undersigned counsel makes this certificate for purposes of complying with Rules 28.3 and 28.5 of the Rules of this Court.

CHRISTOPHER TOMPKINS
DEUTSCH, KERRIGAN & STILES